

*United States Court of Appeals
for the Second Circuit*



**APPELLANT'S
REPLY BRIEF**

ORIGINAL 77-1020

**United States Court of Appeals
For the Second Circuit**

UNITED STATES OF AMERICA,

Appellee,

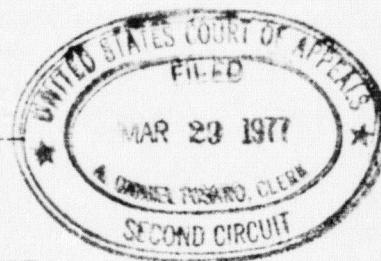
-against-

GERARDO SANCHEZ,

Appellant.

On Appeal From The United States
District Court For The Southern
District of New York

REPLY BRIEF FOR THE APPELLANT



O'ROURKE, McGOVERN & DEGEN
Attorneys for Appellant
233 Broadway
New York, N.Y. 10007
(212) 227-4530

Of Counsel:
THOMAS H. O'ROURKE
RONALD D. DEGEN

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CITATIONS.....	1
PRELIMINARY STATEMENT.....	1
ARGUMENT: THE DISTRICT COURT IMPROPERLY DENIED WITHOUT A HEARING APPELLANT'S MOTION TO DISMISS THE INDICTMENT ON THE GROUND THAT COCAINE HAS BEEN MIS- CLASSIFIED AS A NARCOTIC DRUG.....	2
CONCLUSION.....	4

TABLE OF CITATIONS

CASES

<u>United States v. Brookins</u> , 383 F. Supp. 1212 (D.N.J. 1974), <u>aff'd</u> 524 F.2d 1404 (3d Cir. 1975).....	3
<u>United States v. Castro</u> , 401 F. Supp. 120 (N.D. Ill. 1975).....	3
<u>United States v. Hobbs</u> , 392 F. Supp. 444 (D. Mass. 1975).....	3

STATUTES

26 U.S.C. § 4731.....	2
-----------------------	---

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
Docket No. 77-1020

UNITED STATES OF AMERICA,
Appellee,
-against-
GERARDO SANCHEZ,
Appellant.

REPLY BRIEF FOR
THE APPELLANT

PRELIMINARY STATEMENT

In appellant's main brief the Statement of Facts, in large part, was taken from appellant's notice of motion and attached memorandum of law filed on November 3, 1976, but missing from the District Court file at the time of the compilation of the Record on Appeal. A Supplemental Record on Appeal containing that document has been prepared and forwarded to this Court.

A petition for a writ of mandamus was filed in this Court on November 1, 1976. It was denied, as was an application for a stay of the lower court proceedings

submitted on November 3, 1976. While necessarily not part of the Record on Appeal, which includes only pleadings and proceedings in the District Court, they constitute part of the record before this Court.

ARGUMENT

THE DISTRICT COURT IMPROPERLY DENIED WITHOUT A HEARING APPELLANT'S MOTION TO DISMISS THE INDICTMENT ON THE GROUND THAT COCAINE HAS BEEN MISCLASSIFIED AS A NARCOTIC DRUG.

The brief for the United States of America correctly points out that appellant designated the wrong statute in the main brief.. Appellant was indicted under the 1954 Internal Revenue Code, which became 26 U.S.C. § 4731 and was repealed in 1970, effective May 1, 1971.

Appellant joined in a motion by a co-defendant, Hector Echeverria, raising the precise issue presented now and citing the appropriate statute. The Supplemental Record on Appeal includes the notice of motion and memorandum of law submitted. The District Court denied the application without a hearing, although the expected testimony of nine experts was furnished to that tribunal.

For the reasons advanced in support of the contention that the speedy trial and double jeopardy claims

were not waived by reason of the guilty plea, it is likewise submitted that the issue of the constitutionality of the statute survives on appeal.

Although no court has held the classification herein unconstitutional, lower courts have considered cocaine not a narcotic from a medical standpoint (United States v. Castro, 401 F. Supp. 120 (N.D. Ill. 1975); United States v. Hobbs, 392 F. Supp. 444 (D. Mass. 1975); United States v. Brookins, 383 F. Supp. 1212 (D.N.J. 1974), aff' 524 F.2d 1404 (3d Cir. 1975)). It is respectfully urged that this Court remand this case to the lower court, so that the matter can be fully explored and a complete record be made for appellate purposes. Of course, in the alternative, appellant asks this Court to hold that the medical classification of cocaine as a stimulant controls and renders its designation as a narcotic irrational.

CONCLUSION

The judgment of conviction in the District Court should be reversed and the indictment and superseding information dismissed, or in the alternative, the case should be remanded for an evidentiary hearing on the violation of appellant's Fifth and Sixth Amendment rights and on whether cocaine has been misclassified as a narcotic drug.

Respectfully submitted,

O'ROURKE, McGOVERN & DEGEN
Attorneys for Appellant
Office & P.O. Address
233 Broadway
New York, New York 10007
Phone: (212) 227-4530

Of Counsel:
THOMAS H. O'ROURKE
RONALD D. DEGEN

O'ROURKE

AFFIDAVIT OF PERSONAL SERVICE

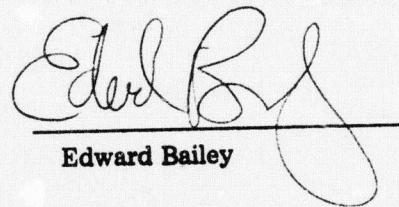
STATE OF NEW YORK
COUNTY OF RICHMOND ss.:

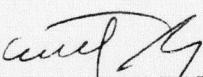
EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 28 day of March ,1977 at No. 1 St. Andrews Pl., NYC

deponent served the within Reply Brief
upon U.S. Atty. So. Dist. of NY Marc Marmaro, Esq.

the Appellee herein, by delivering 3 true copy(ies) thereof to him personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Appellee therein.

Sworn to before me this
28 day of March 1977


Edward Bailey


WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1978